BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

WHIDBEY ENVIRONMENTAL ACTION NETWORK, Petitioner, v. ISLAND COUNTY, Respondent.	Case No. 08-2-0032 **FINAL DECISION AND ORDER**

I. PROCEDURAL HISTORY AND PRELIMINARY MATTERS

The Petition for Review (PFR) in this case was filed on November 19, 2008 challenging Island County's adoption of Ordinance C-117-08. That Ordinance exempted the division of certain parcels of land from the requirements of the County's subdivision ordinance when those divisions are created by a public road right-of-way bisecting the land. Whidbey Island Environmental Network (WEAN) contends this exemption allows the creation of lots in rural zoning districts that are exempt from the density and size requirements of the underlying zoning in violation of the GMA's mandates to reduce sprawl and conserve natural resource lands.

On February 2, 2009, in response to a motion brought by WEAN to apply the equitable principles of *res judicata* and *collateral estoppel* and thereby find Ordinance C-117-08 has the identical purpose and effect as a previously invalidated ordinance, Ordinance C-61-06,[1] the Board reserved a ruling on the matter and requested the parties address the Board's authority to apply equitable doctrines in their hearing briefs.[2]

[1] The Board invalidated Ordinance C-61-06 on January 24, 2007 with its Final Decision and Order in Case No. 06-2-0023.

[2] February 2, 2009, Order on Motion.

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Briefs were filed by WEAN on February 26, 2009 and by Island County on March 19, 2009. WEAN filed its reply brief on March 26, 2009.[3]

Also on March 26, 2009, WEAN filed a fourth request for the Board to take official notice and supplement the Record.[4] With this request, WEAN seeks to supplement the record with several excerpts from the Island County Comprehensive Plan, the Island County Zoning Code, Island County Assessor's property records, and the Board's Practice Handbook. At the Hearing on the Merits (HOM), the Board reserved ruling on this request to the Final Decision and Order (FDO) since the County had not had an opportunity to respond. Since that time, the Board has received no objection from the County in regards to these documents and therefore finds that the materials may substantially assist the Board. WEAN's 4th Request is GRANTED.

The Board notes that with the exception of the following documents, WEAN failed to attach any of the record to its brief as exhibits:[5] copy of Ordinance C-83-07 (IR 9436); an August 31, 2007 Island County Planning & Community Development Department Memo (IR 9439); an August 10, 2004 Island County Planning & Community Development Department Memo (IR 9871); a July 13, 2007 Island County Planning & Community Development Department Memo (IR 9938); and a November 6, 2008 one page WEAN memo to the Island County Commissioners (IR 9945). Instead, WEAN apparently attempted to rely on exhibits it submitted with earlier motions to supplement the record.[6] As the Board noted at the

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[3] At the Hearing on the Merits, the Board noted WEAN's Reply Brief was over the page limit set forth in the December 22, 2008 Prehearing Order. In order to comply with the page limits, at the HOM WEAN redacted pages 1, 3, 4, 5, 8, 9, and 10 of its Reply Brief.

[4] Petitioner's 4th Request for Official Notice and Motion to Supplement the Record.

[5] For the benefit of the parties, the Board sees the "Record" as being all of the documents considered by the local jurisdiction in taking the challenged action. The Record generally includes minutes of meetings before commissions, committees, or councils, technical and scientific documents, correspondence, laws and regulations, and public comments (oral and written). In contrast, "Exhibits" are those documents presented by the parties to show the Board the facts and convince the Board to decide in favor of that party and encompass specific documents found in the Record,

[6] Petitioner's 1st Request for Official Notice and Motion to Supplement Record, filed January 12, 2009; Petitioner's 2nd Request for Official Notice and Motion to Supplement Record, filed January 20, 2009; Petitioner's 3rd Request for Official Notice and Motion to Supplement Record, filed February 26, 2009;

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Hearing on the Merits, WEAN's brief referenced numerous exhibits that were not attached to its brief. This is in violation of the Prehearing Order which quite clearly provided:[7]

> "The Index to the Record lists the documents that may be introduced as exhibits but those documents do not become evidence until they are referenced in a brief and submitted to the Board as exhibits to that brief … The evidence before this Board in this proceeding shall consist of the exhibits attached to briefs and presented to the Board."

A motion to supplement the record, even when granted, does not place the offered documents into evidence unless and until they are attached to the brief. It is a party's obligation to submit for the Board's consideration those portions of the record upon which it intends to rely. WEAN violated the Prehearing Order in this regard.

The Hearing on the Merits was conducted on April 3, 2009, in Coupeville, Washington. WEAN was represented by Steve Erickson. Island County was represented by Daniel Mitchell. Board members William Roehl and James McNamara were present, with Mr. McNamara presiding. Board member Nina Carter was not available to attend the HOM due to a conflict with other obligations of the Board in Olympia. Due to this, Ms. Carter decided not to participate in the deliberations for this decision and is not a signatory to this FDO.

II. BURDEN OF PROOF

For purposes of Board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

Petitioner's 4th Request for Official Notice and Motion to Supplement the Record, filed March 26, 2009. With the exception of the 4th Request, the Board issued Orders granting each of these requests/motions prior to the April 3, 2009 HOM. *See*, January 26, 2009 Order on 1st Request; February 2, 2009 Order on 2nd Request; March 10, 2009 Order on 3rd Request.

[7] December 22, 2008 Prehearing Order, at 4

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> Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

The statute, at RCW 36.70A.320(3), further provides that the standard of review shall be whether the challenged enactments are clearly erroneous:

> The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

In order to find Island County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[8]

Within the framework of state goals and requirements, RCW 36.70A.3201 requires the Board grant deference to local governments in how they plan for growth:

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

In sum, the burden is on WEAN to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth Management Act).[9] Where not clearly erroneous, and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

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[8] *Department of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[9] RCW 36.70A.320(2).

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III. ISSUES PRESENTED[10]

1. By allowing subdivision of resource lands to urban and suburban densities, does C-117-08 fail to comply with GMA's requirements to conserve agricultural lands of long term commercial significance as required by RCW 36.70A.060(1)(a)?

2. By allowing subdivision of rural lands to urban and suburban densities, does C-117-08 fail to comply with GMA's requirements for reduction of sprawl as required by RCW 36.70A.070(5)(c)?

3. By allowing subdivision of Island County's rural and resource lands to urban and suburban densities, does C-117-08 substantially interfere with the fulfillment of GMA's goals for sprawl and natural resource industries as required by RCW 36.70A.020(2)(8) and RCW 36.70A.302(1)?

IV. DISCUSSION

Application of Equitable Principles

As a preliminary matter, the Board DENIES WEAN's request that this case be decided based on the equitable principles of *res judicata* and/or *collateral estoppel.*[11] The Board need not resort to the application of equitable principles in this case. The GMA has provided the Board with the statutory authority to review the record before it and determine whether the challenged ordinance is in compliance with the Act.[12]

The Board has reviewed the record submitted, and conducted a hearing at which it heard the arguments of the parties with regard to the effect of Ordinance C-117-08. This case can be decided on that basis and there is no benefit at this stage of the proceedings to decide the case based on equitable principles. However, this does not preclude the Board from

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[10] As set forth in the Board's December 22, 2008 Prehearing Order.
[11] Res judicata, or claim preclusion, provides that a prior judgment will bar litigation of a subsequent claim by the same parties when the subject matter is the same. Collateral estoppel, or issue preclusion, bars the relitigation of issues by the same parties.
[12] RCW 37.70A.280(1).

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considering its past decisions, including the Final Decision and Order (FDO) issued in WWGMHB No. 06-2-0023, to the extent those decisions provide guidance.

Effect of Ordinance C-117-08

Ordinance C-117-08 amends the Island County Comprehensive Plan in several regards. It adds a new section to the Comprehensive Plan's General Land Use Policies regarding Public Road Right-of-Way Segregation which sets forth a goal and related policies. It also adds new language to the Rural Element Land Use Designation Policies in several land use designations, including the Rural Center (RC), Rural Village (RV), Light Manufacturing (LM), Rural Service (RS), Airport (AP), Rural Residential (RR), Rural (R), Rural Forest (RF), Rural Agriculture (RA), and Commercial Agriculture (CA) zones.[13] The overarching goal of the Public Road Right-of-Way Segregation enacted by the County is:[14]

> Establish standards and limitations for the reasonable and orderly development and use of parcels, tracts and lots that are bisected by a public road right-of-way or that have previously been segregated because of the presence of a public road right-of-way.

For example, the RC provision of the Island County Rural Element adds the following new language:[15]

> K. Tax lots created by public right-of-way separation prior to January 24, 2007 in the Rural Center designation shall be considered lawfully established existing lots of record.
>
> L. For tax lots separated by a public road right-of-way which have not yet been segregated, it may be done provided it can be determined that the separation does not exist as a result of a prior land use action, e.g. boundary line adjustment, segregation, etc.
>
> M. Further subdivision or boundary line adjustment of tax lots created by right-of-way separation are required to conform to the standards of Chapter 16.06. ICC and Chapter 17.03. ICC.

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[13] County's Exhibit A, Ordinance C-117-08.
[14] County's Exhibit A, Ordinance C-117-08 – Exhibit A, at 24.
[15] County's Exhibit A, Ordinance C-117-08 – Exhibit A, at 9.

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In the RR, R, RF, RA, and CA areas, new provisions creating an exception from lot size and density requirements include:[16]

> Tax lots created by public right-of-way separation prior to January 24, 2007 in the Rural Residential[17] designation shall be considered lawfully established existing lots of record and are not required to meet base density or the minimum lot size requirements.

And:

> For tax lots separated by a public road right-of-way which have not yet been segregated, it may be done provided it can be determined that the separation does not exist as a result of a prior land use action, e.g. boundary line adjustment, segregation, etc. All tax lots created thereafter shall be considered lawfully established existing lots of record even if the tax lot does not meet the base density or minimum lot size requirements.[18]

In addition, the Ordinance amends Chapter 17.03 of the Island County Code for a similar effect.[19] For example, ICC 17.03.060 C.7 provides for the Rural (R) zone:

> "Parcels previously segregated as a result of the presence of a Public Road right-of-way shall be exempt from minimum Lot size and density requirements."

RCW 36.70A.060(1)(a) – Assuring the Conservation of Agricultural Lands

RCW 36.70A.060(1)(a) provides:

> Except as provided in RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best

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[16] County's Exhibit A, Ordinance No. C-117-08 – Attachment A, at 15-21.
[17] Similar appropriate language was adopted for the R, RF, RA and CA zones.
[18] See, eg. the Rural Center provision, policy E.
[19] County's Exhibit A, Ordinance No. C-117-08 – Attachment B, at 25-35.

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> management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

WEAN argues Ordinance C-117-08 violates RCW 36.70A.060(1)(a) because it creates the right to develop at a greater density than that which the County has already determined to be the minimum necessary for conservation of resource lands.[20] It further argues the conversion of agricultural land to residential development fails to conserve the land on which the house and associated development occur. It points out that the County has determined a single residence for every 20 acres is an acceptable loss while still maintaining the overall land use and, therefore, C-117-08 violates this determination.[21]

In response, the County argues Ordinance C-117-08 does not interfere with the commercial agricultural uses of the affected properties.[22] It notes that the parcels will remain in the CA zone and therefore remain subject to all development regulations governing CA properties, aside from size and density requirements. The County argues that only seven CA parcels are affected by C-117-08, three of which have not yet been segregated.[23]

However, WEAN points out that the ordinance affects more than the seven parcels noted by the County, as the adjacent land is also affected when residents, unhappy with the sounds and smells of agricultural activities, create pressure on farmers to discontinue operations.[24]

The Board was faced with the question of the effect of substandard lots on agricultural lands in the earlier case of *WEAN v. Island County*, WWGMHB No. 06-2-0023. In the FDO for that case we held:[25]

> RCW 36.70A.060(1)(a) requires that the County's development regulations "assure the conservation" of agricultural lands (among other natural resource lands). The amendment to ICC 16.06.020(E) provides that substandard lots created by public rights-of-way prior to June 5, 2006 become "existing lots of

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[20] WEAN's Reply Brief at 21.
[21] Id.
[22] County Response at 29-30.
[23] Id. at 29.
[24] WEAN Reply at 21.
[25] January 24, 2007 FDO, at 13 (Internal Citations Omitted) (Emphasis added).

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> record". **Creating additional substandard lots in agricultural lands converts portions of those lands to residential uses rather than conserving them for agriculture. The County has already determined that 20 acres is the minimum lot size for agricultural lands of long term commercial significance. By further subdividing agricultural lands, the County violates its own determinations about the conservation of commercial agriculture. Further, the addition of non-agricultural uses in agricultural lands converts agriculture land to other uses and creates potential conflicts with agriculture – the very thing that designation of agricultural lands is designed to prevent.** "The greatest threat to long-term productive NRLs [natural resource lands] is nearby conflicting uses."

The Board finds the same reasoning applies in the present case. The County's comprehensive plan goal for Commercial Agriculture (CA) lands – the lands at issue – provides:[26]

> Reserve lands which because of their size, soil type, and active management are part of an essential land base to continued commercial agriculture, and assure their continued viability to serve as a resource for food, fiber, feed and forage.

The County's policies then provide the minimum parcel size for lands of this designation shall be 20 acres.[27] However, the exemption created by Ordinance C-117-08 provides that tax lots created by public right-of-way separation prior to January 24, 2007 are not required to meet base density or the minimum lot size requirements and an implementing provision at ICC 17.03.100 codifies this exemption in the zoning code.[28] This is exactly the same type of clearly erroneous action the Board found in Case No. 06-2-0023. The County again violates its own determinations about the conservation of commercial agriculture, creates an environment to convert agricultural land to other uses, and creates potential conflicts with continued use of the land for agriculture.

Because Ordinance C-117-08 contains provisions at odds with the conservation of agricultural resource lands, the Board concludes that it violates RCW 35.70A.060(1)(a).

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[26] County's Exhibit A, Ordinance C-117-08 – Attachment A, at 21.
[27] *Id.* at 21, Policy A.
[28] *Id.* at 21, Policy B; Attachment B, at 30.

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RCW 36.70A.070(5)(c) – Protection of Rural Land from Sprawl

RCW 36.70A.070(5)(c) provides:

> (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:
> …
> (c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:
> (i) Containing or otherwise controlling rural development;
> (ii) Assuring visual compatibility of rural development with the surrounding rural area;
> (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
> (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and
> (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

The Board next considers whether C-117-08 fails to comply with GMA's requirements for the reduction of sprawl as set forth in RCW 36.70A.070(5)(c).

WEAN argues that Ordinance C-117-08 violates RCW 36.70A.070(5)(c) because exempting parcels split by roads and rights-of-way from the minimum size and density standards for their respective zones will exacerbate existing sprawl and create new patterns of sprawl throughout the County.[29]

WEAN argues that substandard lots are the essence of sprawl.[30] According to WEAN, allowing the creation of new lots, exempt from minimum lot size and density requirements, without any requirements for cluster developments, is simply new, unplanned sprawl.

While WEAN has not submitted any evidence from which the Board can examine the particular effect of C-117-08 on lot sizes in rural Island County, the County concedes that

[29] WEAN's Opening Brief at 16.
[30] Id. at 17.

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215 lots have been created using the right-of-way exception.[31] Of these, approximately 91 were developed, approximately 124 remain undeveloped, and 319 parcels were separated by a public right of way but remain un-segregated.[32] Furthermore, even in the absence of maps of the affected parcels, the Board has before it the language of Ordinance C-117-08 which makes clear the purpose and effect of the new provisions with regard to minimum lot size and density requirements.

Among other provisions, Ordinance C-117-08 amends various rural zoning development standards, such as the Rural (R), Rural Residential (RR), Rural Agricultural (RA), Commercial Agricultural (CA), Rural Forest (RF), Rural Center (RC), Rural Village (RV), and Rural Service (RS) zones, to create an exemption from lot size and density requirements. For example, ICC 17.03.060, which provides for a minimum 5 acre lot size in the R zone, was amended to include the following provision:[33]

> Parcels previously segregated as a result of the presence of a Public Road right-of-way shall be exempt from minimum Lot size and density requirements.

Furthermore, a parcel that is separated by a public road right-of-way ("road") and was not previously segregated, may still be segregated without meeting minimum lot size or density standards if the road was in existence on January 24, 2007; no prior segregations, BLAs, subdivisions, or lot combinations have caused the road to bisect the parcel; and no prior lot line adjustments have caused the segregation to result in substandard lot sizes or to exceed base densities.[34]

From the wording of the amendatory language challenged by WEAN, it would appear to the Board that the County is permitting low-density sprawling development within its rural lands in violation of RCW 36.70A.070(5). In defense of its action, the County contends the newly adopted language complies with the GMA because it respects unique local circumstances

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[31] County Response at 3.
[32] *Id.*
[33] ICC 17.03.060(C)(7).
[34] See, eg. ICC 17.03.060 C. 8.

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and provides an innovative technique to address these circumstances; is extremely limited in application; recognizes that the GMA provides no bright line density rules; and accommodates rural densities consistent with rural character.[35] The Board will address each of these assertions in turn.

Unique Local Circumstances

The County justifies Ordinance C-117-08's effect on densities and lot sizes based on the principle that the GMA recognizes circumstances vary from county to county in regards to rural areas.[36] It argues this ordinance is "entirely a product of unique local circumstances" in that the County and the State Department of Transportation have acquired rights-of-way for the purpose of constructing roads and, often, these rights-of-way bisect properties because it would have been inefficient and unrealistic to site roads along already existing property lines.[37]

However, the County has failed to show how this situation is "unique to Island County". In fact, the bisection of property is not a "unique local circumstance" but occurs throughout the state. Further, while the GMA provides that "in establishing patterns of rural densities and uses, a county may consider local circumstances,"[38] Ordinance C-117-08 does not "establish a pattern of rural densities" at all. The densities resulting from exceptions to the rural densities provided in the County Comprehensive Plan and zoning code follow no pattern because those densities are not the result of planning but are the mere residual effect of the division of property by right-of-way. The Board holds that the residual densities resulting from the existence of road rights-of-way is not a "pattern" of rural densities based on local circumstances as contemplated by the GMA.

Limited in application

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[35] County Response at 18.
[36] *Id*. at 19.
[37] *Id.*
[38] RCW 36.70A.070(5)(a).

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The County's primary justification for exemptions from density and lot size requirements appears to be that the overall effect of Ordinance C-117-08 is minimal, affecting only one percent of parcels county-wide in Island County.[39] The County did not provide any figure for the percentage of *rural* parcels affected. Nevertheless, the County states the Ordinance would exempt approximately 534 parcels from lot size and density requirements.[40]

While the County stresses the limited scope of this provision, its argument is undercut by the fact that the location and size of the parcels exempted from lot size and density requirements is not the result of thoughtful planning. There is no evidence the County determined a particular area could absorb a specific number of lots of a particular size/density and still retain the area's rural character. Instead, the properties affected, by the very nature of the exemption, are located wherever a road crossed a property line. Thus, even if the Board were to conclude that, on a County-wide basis, there was a *de minimis effect* on rural character, this is not necessarily the case in those particular areas where the exemptions apply. There are no provisions in place in those circumstances to protect rural character, such as development application review, because the creation of these substandard lots is not the result of land use planning, but simply of roadway engineering. As shown at the HOM, in those areas where a road crosses a parcel at a tangent, an entire line of substandard properties is created.

No Bright Line Rules

The County also notes there is no bright line rule for maximum rural densities. The County is only partially correct. While the GMA does not establish numerically-based rural densities, and while the Growth Management Hearings Boards do not have the power to dictate densities, Island County can and has established rural densities. For example, ICC 17.03.060 provides;

[39] County Response at 20.
[40] *Id.*.

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> The Rural Zone is the principal land Use classification for Island County. Limitations on density and uses are designed to provide for a variety of rural lifestyles and to ensure Compatible uses.

That code section thereafter provides that the minimum lot size in the Rural (R) zone shall be five (5) acres.[41] The Board is not determining bright line maximum rural density rules, as the County suggests.[42] Rather, the County has already established what it believes are appropriate rural densities.

Densities Consistent with Rural Character

Finally, the County argues that Ordinance C-117-08 will accommodate rural densities that are consistent with rural character and will not allow for densities that are characterized by urban growth.[43] Here again, the County focuses not on the character of those areas affected by an exemption from rural density and lot size requirements, but on the effect on Island County as a whole, as it noted: [44]

> When reviewing the entire 'pattern of land use and development' established by Island County in the rural element of the comprehensive plan, it is clear that when viewed as a whole, there are numerous measures in place to reduce the inappropriate conversion of undeveloped land into sprawling low-density development.

However, the threat posed by Ordinance C-117-08 to the rural character of Island County exists not when viewing the County as a whole, but on those areas where the exemption would specifically apply. In those areas, the County concedes that the effect would be to convert undeveloped lands with a resulting density below that provided for in the Comprehensive Plan and Zoning Code.[45] Such sub-standard densities are not consistent with rural character as the County asserts, but instead allow unplanned, low-density sprawl in the rural areas.

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[41] ICC 17.03.060(C)(1). Similarly, in ICC 17.03.090(D)(1) the minimum lot size is 10 acres for the RA zone; in ICC 17.03.100(E)(1), the minimum lot size is 20 acres for the CA zone.
[42] Id. at 22.
[43] County Response at 22.
[44] Id. at 25.
[45] Id..

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As noted above, while the Board does not apply the equitable doctrines of *res judicata* or *collateral estoppel* to decide these cases, it may and does take guidance from its prior decisions. In that light, it is instructive to note the Board's reasoning in a recent Board case dealing with Island County's subdivision code which also created exceptions for lots divided by a road right-of-way.[46]

> The new exemption provides that substandard lots in rural areas created by public rights-of-way can be "existing lots of record" and developable without regard to the underlying zoning density requirements. Some of the lots thus created are smaller than the lot sizes required for the allowed densities in the rural zones in which they are located. The County established the rural densities as part of the rural element of its comprehensive plan and in aid of protecting Island County's defined "rural character." Under Ordinance C-61-06, the lots created by public rights-of-way are not reviewed to assure conformance with either rural densities or "rural character."

Ordinance C-117-08 has the same effect, although through a different mechanism. As with Ordinance C-61-06, which this Board found to contain invalid provisions, Ordinance C-117-08 creates substandard low-density development in the rural areas of Island County. By the County's own admission, this is not an isolated phenomenon but applies to hundreds of parcels in the rural areas.

In conclusion, Ordinance C-117-08 allows for the creation of new developable lots in the rural area. Many of those lots are smaller than the lot sizes required for the allowed underlying zoning densities. The underlying zoning densities were established by the County for rural areas to achieve a variety of rural densities while preserving the rural character of the County as required by RCW 36.70A.070(5). Ordinance C-117-08 allows a significant number of below-rural density lots to be developed, thus creating, rather than reducing, "sprawling low-density development in the rural area." This fails to comply with RCW 36.70A.070(5)(c).

Invalidity

[46] See, WEAN v. Island County, WWGMHB No. 06-2-0023, FDO (1/27/07).

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With regard to Issue 3, the question of invalidity, the Board looks to our decision in Case No. 06-2-0023. In that case we held:[47]

> A finding of invalidity may be entered when a board makes a finding of noncompliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).
>
> We have held that invalidity should be imposed if continued validity of the noncompliant comprehensive plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning.

Just as with Ordinance C-61-06, which this Board found to contain invalid provisions, the continued validity of the new exemptions from lot size and density would allow landowners to create substandard but developable lots in both the agricultural and rural areas during the compliance remand period. As the Board has concluded in this FDO, allowing such new substandard developable lots fails to comply with RCW 36.70A.060(1) because it does not conserve natural resource lands; and with RCW 36.70A.070(5)(c) because it promotes sprawling low-density development in the rural areas. Ordinance C-117-08 also interferes with the fulfillment of two goals of the GMA related to the specific requirements for agricultural lands and rural areas – Goal 2 and Goal 8. Goal 2, set forth in RCW 36.70A.020(2), provides :

> Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

Goal 8, set forth in RCW 36.70A.020(8), provides:

> Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries, Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

Unregulated development of substandard lots in agricultural lands has the potential to convert those lands to residential uses. This creates the probability of conflict with

[47] January 24, 2007 FDO, at 17.

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agricultural uses. It also puts pressure on adjacent agricultural lands to convert to more intense uses. In this way, the provisions of Ordinance C-117-08 fail to comply with the requirements of RCW 36.70A.060(1) to conserve resource lands and also substantially interfere with the fulfillment of Goal 8, which calls for planning actions to encourage the conservation of productive agricultural lands.

While the County must be granted a period of time in which to bring Ordinance C-117-08 into compliance, during the pendency of the compliance period, property owners would have substantial motivation to initiate and vest building applications under these clearly erroneous regulations. Allowing that to occur would affect the ability of the County to cure the impacts of this noncompliant ordinance. For these reasons, the Board finds that the provisions of Ordinance C-117-08 substantially interfere with the fulfillment of Goals 2 and 8 of the GMA and are invalid.

V. FINDINGS OF FACT

1. Island County is located west of the crest of the Cascade Mountains and is required to plan according to RCW 36.70A.040.
2. WEAN has participated orally and in writing in the process to adopt Ordinance C-117-08.
3. Ordinance C-117-08 was adopted by the Island County Commissioners on November 10, 2008. WEAN filed its Petition for Review in this case on November 19, 2008.
4. Island County Ordinance C-117-08 amends the Island County Comprehensive Plan and Chapter 17.03 of the Island County Code, exempting certain lands from the minimum lot size and density requirements of the County Code.
5. Ordinance C-117-08 adds a new section to the Comprehensive Plan's General Land Use Policies regarding Public Road Right-of-Way Segregation which sets forth a goal and related policies. It also adds new language to the Rural Element Land Use Designation Policies in several land use designations, including the Rural Center (RC), Rural Village (RV), Light Manufacturing (LM), Rural Service (RS), Airport (AP),

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Rural Residential (RR), Rural (R), Rural Forest (RF), Rural Agriculture (RA), and Commercial Agriculture (CA) zones.

6. The stated goal of the Public Road Right-of-Way Segregation enacted by the County is: "Establish standards and limitations for the reasonable and orderly development and use of parcels, tracts and lots that are bisected by a public road right-of-way or that have previously been segregated because of the presence of a public road right-of-way."
7. The RC, RV, LM, RS, AP, RR, R, RF, RA, and CA provisions of the Island County Rural Element add new language to the effect that tax lots created by public right-of-way separation prior to January 24, 2007 in these zones shall be considered lawfully established existing lots of record.
8. These provisions also provide that for tax lots separated by a public road right-of-way which have not yet been segregated, it may be done provided it can be determined that the separation does not exist as a result of a prior land use action, e.g. boundary line adjustment or segregation.
9. 215 lots have been created using the right-of-way exception. Of these, approximately 91 were developed, approximately 124 remain undeveloped, and 319 parcels were separated by a public right of way but remain un-segregated.
10. The County's comprehensive plan goal for Commercial Agriculture (CA) lands provides: "Reserve lands which because of their size, soil type, and active management are part of an essential land base to continued commercial agriculture, and assure their continued viability to serve as a resource for food, fiber, feed and forage."
11. Creating additional substandard lots in agricultural lands converts portions of those lands to residential uses rather than conserving them for agriculture.
12. The County has already determined that 20 acres is the minimum lot size for agricultural lands of long term commercial significance.
13. The addition of non-agricultural uses in agricultural lands converts agriculture land to other uses and creates potential conflicts with agriculture.

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14. There is no evidence the County determined a particular rural area could absorb a specific number of lots of a particular size/density and still retain the area's rural character. Instead, the properties affected, by the very nature of the exemption, are located wherever a road crossed a property line.
15. Island County can and has established rural densities. For example, ICC 17.03.060 provides: "The Rural Zone is the principal land Use classification for Island County. Limitations on density and uses are designed to provide for a variety of rural lifestyles and to ensure Compatible uses." That code section thereafter provides that the minimum lot size in the Rural (R) zone shall be five (5) acres.

FINDINGS RELATED TO INVALIDITY

16. The continued validity of the exemptions from lot size and density requirements, as contained in Ordinance C-117-08, would allow landowners to create substandard but developable lots in both the agricultural and rural areas during the compliance remand period.
17. The unregulated creation of substandard lots in the rural area allowed by Ordinance C-117-08 promotes low-density sprawl.
18. The unregulated development of substandard lots in agricultural lands allowed by Ordinance C-117-08 converts those lands to non-agricultural uses. It also creates the potential for conflict with agricultural uses and puts pressure on adjacent agricultural lands to convert to more intense uses.
19. Property owners have substantial motivation to take action to vest building applications on lots created pursuant to Ordinance C-117-08 during the compliance period, thus affecting the ability of the County to cure the impacts of the noncompliant ordinance.
20. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby adopted as such.

VI. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties and subject-matter of this action.

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B. WEAN has standing to bring its challenges to Island County Ordinance C-117-08.

C. The Petition for Review in this case was timely filed.

D. Ordinance C-117-08 fails to comply with the Growth Management Act's requirements for the conservation of agricultural lands by allowing unregulated subdivision for development of substandard lots in agricultural areas. This fails to comply with RCW 36.70A.060(1).

E. Ordinance C-117-08 fails to comply with the Growth Management Act's requirements for reduction of low-density sprawling development in the rural areas by allowing unregulated subdivision for development of substandard lots in the rural areas. This fails to comply with RCW 36.70A.070(5)(c).

F. While the GMA recognizes circumstances vary from county to county in regards to rural areas the County has failed to show how the bisection of land by road rights-of-way is "unique to Island County". The bisection of property is not a "unique local circumstance".

G. The residual densities resulting from the existence of road rights-of-way is not a "pattern" of rural densities based on local circumstances as contemplated by the GMA.

H. Sub-standard densities are not consistent with rural character as the County asserts, but instead allow unplanned, low-density sprawl in the rural areas.

I. The continuing validity of the exemption codified by Ordinance C-117-08 substantially interferes with the fulfillment of GMA goals 2 and 8. RCW 36.70A.020(2) and (8). The provisions of Ordinance C-117-08, are therefore invalid.

J. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby adopted as such.

VII. ORDER

Island County is ordered to bring its comprehensive plan and Chapter 17.03 of the Island County Code into compliance with the GMA in accordance with this decision within 120

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days. Compliance shall be due no later than September 18, 2009**.** The following schedule shall apply:

Compliance Due	**September 18, 2009**
Compliance Report and Index to Compliance	September 25, 2009
Any Objections to a Finding of Compliance Due	October 16, 2009
County's Response Due	October 30, 2009
Compliance Hearing (location to be determined)	November 5, 2009

Entered this 15th day of May, 2009.

_____
James McNamara, Board Member

_____
William P. Roehl, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

<u>Reconsideration</u>. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. <u>Filing means actual receipt of the document at the Board office.</u> RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

<u>Judicial Review</u>. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

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Enforcement. **The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.**

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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